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May 17, 1999

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-A325
Washington, DC 20554

Re: Petition of GTE Service Corporation for Declaratory Ruling Regarding the Use of Section 252(i) to Opt Into Provisions Containing Non-Cost-Based Rates, CC Docket No. 99-143

Dear Ms. Salas:

Enclosed for filing are the comments of NEXTLINK Communications, Inc. and Advanced Telecom Group, Inc. concerning the Petition of GTE Service Corporation for Declaratory Ruling Regarding the Use of Section 252(i) to Opt Into Provisions Containing Non-Cost-Based Rates, CC Docket No. 99-143.

Very truly yours,

Davis Wright Tremaine LLP

Gregory J. Kopta/BSC

Gregory J. Kopta, Esq.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Request for	)	
	)	CC Docket No. 99-143
Declaratory Ruling Regarding the	)	
Use of Section 252(i) to Opt Into	)	
Provisions Containing	)	
Non-Cost-Based Rates	)	
	)	

Comments of NEXTLINK Communications and Advanced Telecom Group

NEXTLINK Communications, Inc. ("NEXTLINK") and Advanced Telecom Group, Inc. ("ATGI") respectfully provide the following comments in response to the petition of GTE Service Corporation and its affiliated domestic telephone operating companies (collectively "GTE") requesting that the Commission issue a declaratory ruling that requesting telecommunications carriers cannot use Section 252(i) of the Communications Act to "opt into" provisions of interconnection agreements where the cost or rate element in a provision is no longer cost-based ("Petition"). Under the guise of a petition for declaratory ruling, GTE seeks to collaterally attack prior Commission and state commission orders, to subvert the nondiscrimination requirements of the Telecommunications Act of 1996 ("Act") and Commission rules, and to negate the provisions of Section 252(i). The Commission, therefore, should deny the Petition.

I. GTE'S PETITION SEEKS AUTHORITY TO ENGAGE IN UNLAWFUL DISCRIMINATION.

GTE's Petition purports to focus on Section 252(i) of the Communications Act,[1] but GTE disregards -- indeed, proposes to undermine -- the fundamental purpose of that statutory provision. The Commission has observed that this section is "a primary tool of the 1996 Act for preventing discrimination under Section 251."[2] GTE proposes to blunt that tool by specifically authorizing GTE and other incumbent local exchange carriers to deny rates, terms, and conditions in a state commission-approved interconnection agreement to other requesting carriers if the incumbent LEC claims that the rates are "no longer cost-based." The issue is not whether such rates are "cost-based" in the incumbent LEC's view but whether all competing LECs are entitled to be treated equally. Once an incumbent LEC has agreed (or been required through arbitration to agree) to provide interconnection, services, or elements at state commission-approved rates, Section 252(i) and Rule 809 require that incumbent LEC to provide that same interconnection, service, or element at the same rates to other requesting carriers. The Act and the Commission, therefore, unequivocally require the nondiscriminatory treatment GTE asks the Commission to authorize incumbent LECs to deny.

Rather than even acknowledge the issue of nondiscrimination, GTE relies on the contention that rates that are not "cost-based" do not comply with other provisions of the Act and

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[1] 47 U.S.C. § 252(i).

[2] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 1296 (1996) ("*Local Competition Order*").

Commission rules.[3] GTE neglects to mention, however, that these rates are included in interconnection agreements that have been approved by state commissions. GTE, of course, disagrees with any rate established by a state commission that varies from the rates that GTE is willing to offer. GTE's recourse, however, is to challenge those rates directly in an action in the local federal district court pursuant to Section 252(e)(6) -- a right of which GTE has consistently availed itself -- not to seek permission from this Commission to deny those rates to other requesting carriers. Nothing in the Act or Commission orders or rules authorizes an incumbent LEC to condition its compliance with Section 252(i) on the incumbent LEC's agreement with state commission determinations of cost-based rates under Section 252(d).

To the contrary, the Commission expressly addressed the Act's requirement for cost-based rates when interpreting Section 252(i) and promulgated its rule to be fully consistent with that obligation. The Commission concluded that the Act's cost and technical feasibility provisions, "read together, require that publicly filed agreements be made available only to carriers who cause the incumbent LEC to incur *no greater costs* than the carrier who originally negotiated the agreement, so as to result in an interconnection agreement that is both cost-based and technically feasible."[4] The Commission's rule thus specifically authorizes GTE to limit the availability of rates, terms, and conditions in state commission-approved agreements only when GTE "proves to the state commission that . . . the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are *greater* than the costs of

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[3] Petition at 4-5.

[4] *Local Competition Order* at ¶ 1317 (emphasis added).

providing it to the telecommunications carrier that originally negotiated the agreement."[5]

Rule 809 thus requires incumbent LECs to provide the same rates only to carriers that do not impose greater costs on the incumbent LEC, but the rule simply cannot be interpreted to authorize the incumbent LEC to second-guess the state commission on whether a rate charged to one carrier is "cost-based" prior to making that rate available to other similarly situated carriers. The Supreme Court observed that Rule 809 is already "more generous to incumbent LECs than § 252(i) itself."[6] GTE, however, strains generosity to the breaking point by essentially asking the Commission to revise its statutory analysis and its rule to authorize incumbent LECs to deny a particular interconnection, service, or element even when the costs of providing it to the requesting carrier are the same, solely on the basis of the incumbent LEC's belief that the rate for that interconnection, service, or element is "no longer cost-based." The Act is not susceptible to such an interpretation, nor could the Commission accept such a position without fundamentally undermining the nondiscrimination and pro-competition principles the Commission has recognized and established.

The practical effect of GTE's proposal would be Commission-sanctioned discrimination and the inability of requesting carriers to "opt into" an existing interconnection agreement that contains any rate with which the incumbent LEC disagrees. Most obviously, incumbent LECs could deny requesting carriers the right to opt into any agreement or provision of an agreement that includes arbitrated rates that are lower than the rates proposed by the incumbent LEC. These

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[5] 47 C.F.R. § 51.809(b) (emphasis added).

[6] *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 738 (1999).

rates, however, are the only alternative to the rates proposed by an incumbent LEC in the many states that only establish rates through arbitration[7] or have yet to conclude generic costing and pricing proceedings for interconnection and access to unbundled network elements.[8] Even agreements that include the rates offered by the incumbent LEC may not be available if the incumbent LEC subsequently determines that those rates are now too low and thus are "no longer cost-based." Section 252(i) and Rule 809 would cease to exist in any viable form if the Commission were to grant GTE's Petition, nullifying the Commission's promise that "[u]nbundled access to agreement provisions will enable smaller carriers who lack bargaining power to obtain favorable terms and conditions -- including rates -- negotiated by large IXCs, and speed the emergence of robust competition."[9]

GTE seeks nothing less from the Commission than the authority for incumbent LECs to force any CLEC either to accept rate discrimination or to waste precious time and resources on unnecessary arbitrations while compelling every state commission to relitigate each of its rate determinations on a CLEC by CLEC basis. Section 252(i) and Rule 809 were designed to prevent just such barriers to entry into local exchange markets. The Commission should deny GTE's attempt to thwart the development of local competition and should reaffirm its

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[7] *See, e.g., In re Petitions for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE Florida*, Docket Nos. 960847-TP & 960980-TP, Order No. PSC-97-0064-FOF-TP (Fla. Public Serv. Comm'n Jan. 17, 1997).

[8] *See, e.g., In re Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale, et al.*, Docket Nos. UT-960369, 960370 & 960371 (Wash. Utils. & Transp. Comm'n) (pending final order on pricing).

[9] *Local Competition Order* ¶ 1313.

"conclu[sion] that incumbent LECs must permit third parties to obtain access under section 252(i) to *any* individual interconnection, service, or network element arrangement on the same terms and conditions as those contained in *any* agreement approved under section 252."[10]

II. THE COMMISSION SHOULD NOT PERMIT GTE TO COLLATERALLY ATTACK PRIOR COMMISSION DECISIONS IN THE GUISE OF A PETITION FOR DECLARATORY ORDER.

The generic relief GTE seeks masks the broad potential mischief the requested declaratory order would cause, but also thinly veils GTE's ultimate objective of collaterally attacking other Commission decisions. GTE's use of compensation for Internet Service Provider ("ISP") as an "example" of an interconnection contract term that is "no longer cost based" demonstrates that GTE's Petition is merely a vehicle for relitigating the Commission's most recent order on ISP traffic compensation. GTE's other "example" -- state commission decisions establishing incumbent LECs' reciprocal compensation obligations at the tandem, rather than the end office rate -- represents an attack on the Commission rule that specifically requires such compensation rates. GTE has had its opportunity to challenge those Commission decisions directly, and the Commission should refuse to entertain a petition that is little more than an untimely and unpersuasive motion for reconsideration.

[10] *Local Competition Order* ¶ 1314 (emphasis added).

A. All Similarly Situated Carriers Should Have Access to State Commission-Approved Interim Compensation Mechanisms for Terminating ISP Traffic.

GTE devotes a substantial portion of its Petition to rearguing the issue of reciprocal compensation for ISP traffic.[11] The Commission has already addressed this issue and determined that further Commission investigation is required and that, in the interim, state commissions may require such compensation:

> Even where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic. . . . As we observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant to [47 U.S.C.] section 252 "extends to both interstate and intrastate matters." Thus the mere fact that ISP-bound traffic is largely interstate does not remove it from the section 251/252 negotiation and arbitration process. However, any such arbitration must be consistent with federal law. While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.
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> . . . . Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain circumstances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law. *A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic.*[12]

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[11] Petition at 5-7 & 9-10.

[12] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of*

GTE's dissatisfaction with the Commission's order provides no grounds for denying reciprocal compensation for ISP traffic to all requesting CLECs. Once a state commission has determined that an incumbent LEC must compensate a CLEC for terminating ISP traffic originated by the incumbent LEC's customers, other CLECs are entitled to such compensation consistent with the terms of Section 252(i) and Rule 809 without the burden of individually arbitrating that issue with the incumbent LEC. Again, federal law requires nondiscrimination. If GTE believes that reciprocal compensation for ISP traffic is not "cost-based," it should raise that issue in the proper Commission or state commission proceeding, but GTE's proposal to selectively compensate only those CLECs that arbitrate the issue directly conflicts with the Act and Commission rules and orders.

B. GTE Should Not Be Permitted to Challenge the Commission's Previous Determination That CLECs Are Entitled to Reciprocal Compensation at the Tandem Rate.

The other "example" of interconnection contract rates that GTE believes are not cost-based are provisions requiring that incumbent LECs compensate CLECs for the transport and termination of local traffic at the incumbent LEC tandem rate.[13] The Commission has already rejected this position. The Commission "direct[ed] states to establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic when arbitrating disputes under section 252(d)(2)," subject only to adjustment if the CLEC could prove that its

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1996, CC Docket No. 96-98, FCC 99-38, Declaratory Ruling ¶¶ 25-26 (Feb. 26, 1999) (quoting *Local Competition Order*, 11 FCC Rcd at 15544) (footnotes omitted and emphasis added).

[13] Petition at 7-9.

costs are higher than the incumbent LEC's transport and termination costs.[14] "Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than the incumbent LEC is the incumbent LEC's tandem interconnection rate."[15] The Commission thus established technologically neutral reciprocal compensation rates by requiring that a CLEC receive the same compensation as the incumbent LEC if the CLEC transports and terminates traffic over roughly the same distances as the incumbent LEC, regardless of whether the CLEC uses a single switch or multiple switches.

The Commission, therefore, has already determined that compensating CLECs at the incumbent LEC tandem rate is cost-based compensation that complies with the Act. GTE's continuing disagreement with the Commission's decision provides no basis for the Commission to allow incumbent LECs to require every CLEC seeking such compensation to waste party and administrative agency resources and time by individually arbitrating this issue. The Act and Commission rules require incumbent LECs to make reciprocal compensation provisions of state commission-approved agreements to any other requesting CLEC, and the Commission should not permit GTE to avoid that obligation.

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[14] *Local Competition Order* ¶ 1089.

[15] 47 C.F.R. § 51.711(a)(3); *accord Local Competition Order* ¶ 1086.

III. CONCLUSION

For the foregoing reasons, NEXTLINK and ATGI urge the Commission to deny GTE's Petition.

Respectfully submitted,

NEXTLINK Communications, Inc., and Advanced Telecom Group, Inc.

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May 17, 1999

CERTIFICATE OF SERVICE

I, Richard L. Cys, in the law firm of Davis Wright Tremaine LLP, do hereby certify that a copy of the aforesaid "Comments of NEXTLINK Communications and Advanced Telecom Group, Inc." was served on May 17, 1999, on the persons specified below in the manner indicated.

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